DECISION OF NEW YORK STATE COURT OF APPEALS

STATE OF NEW YORK COURT OF APPEALS

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4 No. 434

In the Matter of Jeanne Steinhardt, as Executrix for James McKee, Jr.,

Appellant,

v.

Johns-Manville Corporation, *et al.*,

Respondents.

1 No. 435

Stanley Rosenberg &ano.,

Appellants,

v.

Johns-Manville Sales Corporation, &c., *et al.*,

Respondents.

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and 5 other actions:
Brenner v. Johns-Manville et al.
Cohen v. Johns-Manville et al.
Failla v. Johns-Manville et al.
Ferrarese v. Johns-Manville et al.
Weinberg v. Johns-Manville et al.

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

(434) Frank S. Kedzielawa, Carl A. Green, & James W. Kirkpatrick, Buffalo, for appellant.

Alexander C. Cordes & Paul F. Jones, Buffalo, for respondents GAF et al.

Lawrence T. D'Aloise, Jr., White Plains, & Daniel T. Roach, Buffalo, for respondent Johns-Manville.

Thomas F. Segalla, Buffalo, for respondent Fibreboard Paper.

(435) Norman J. Landau, NY City, for appellants.

Lawrence T. D'Aloise, Jr., White Plains, for respondents Johns-Manville et al.

Franklin N. Meyer, NYC, for respondents Raybestos et al.

Michael Majewski & Joseph D. Ahearn, NYC, for respondents Southern Asbestos & H.K. Porter Co.

James J. Lysaght, Mineola, for respondent Colt Industries.

MEMORANDUM:

The orders of the Appellate Division should be affirmed, with costs.

Plaintiffs in these actions, asserting injuries caused by the inhalation of asbestos particles, each commenced his action more than four years after their or their decedents' last employment-related exposure to asbestos. In *Schmidt* v. *Merchants Despatch Trans Co* (270 NY 287), where the plaintiff alleged that the inhalation of dust while in the defendant's employ caused him to contract the disease known as pneumoconiosis, this Court held that the statutory period of limitations began to run when the plaintiff inhaled the foreign substance. This principal was later reaffirmed in *Schwartz* v *Heyden Newport Chemical Corp* (12 NY2d 212; cert den 374 US 808), involving a compound inserted into the plaintiffs' sinuses for the purpose of making them more perceptible in x-ray examination. Accordingly, if this rule is still controlling, each of the causes of action brought by plaintiffs is barred by the statute of limitations. Plaintiffs now urge, however, that the statutes of limitations applicable to their cases should not run from the date of the last exposure to the invading substance, but rather from

the date on which the asbestos related disease was or could have been discovered. We are unable to adopt this proposed standard, and we reaffirm the principle announced in *Schmidt* and followed in *Schwartz*. Only recently, in *Thornton* v *Roosevelt Hospital* (47 NY2d 780), where it was alleged that a thorium dioxide substance manufactured by the defendant and injected into the deceased plaintiff resulted in the onset of cancer, we held "that the cause of action accrued at the time of invasion of decedent's body, and not at the time" the condition became apparent. There, we noted that further extension of the limited discovery provision contained within the CPLR (214-a) was a matter best reserved for the Legislature, and not for the courts.* We believe it to be inappropriate and injudicious to intrude into an area best suited for legislative scrutiny. We have considered plaintiffs' other contentions and find them to be without merit.

M/o Steinhardt v Johns-Manville Corp.
Case No: 434

Rosenberg v Johns-Manville Corp.
Case No: 435

FUCHSBERG, J. (dissenting):

The orders appealed from in these cases should be reversed and the motions for summary judgment denied.

Once again we are confronted with a determination that plaintiffs who, alleging tortious wrongdoing as a result of which they were injured, are held to have been barred by the statute of limitations before they learned or could have learned that they had sustained the injuries of which they complain.

Though to state this proposition would appear to be to refute it, the majority, under what it takes to be the restraint of three

*As the dissent recognizes, the Legislature has acted but has so far gone no further than "Agent Orange" cases.

cases, *Schmidt v Merchants Despatch Transp. Co.* (270 NY 287), *Schwartz v Heyden Newport Chemical Corp.* (12 NY2d 212) and, most recently, *Thornton v Roosevelt Hospital* (47 NY2d 770), a decision in which I filed a dissent, in effect upholds it.

In my view, the cases cited are too confusing and contradictory to support such a result. For example, in *Schmidt*, though the court held that dust which produced a disease of the lungs set off the running of the statute when it was ingested rather than when the injury came to the fore, the court, inexplicably, also proclaimed (p. 300) that "there can be no doubt that a cause of action accrues only when the forces wrongfully put in motion *produce injury*" (emphasis added). Further, in the relatively short time which has elapsed since *Thornton* was decided, the Legislature already has issued policy pronouncements that cut across the legal philosophy they bespoke.[1] In such circumstances, the vitality of judge-made law depends in no small measure upon a readiness to have the judiciary, and not the Legislature, as *Thornton* and the majority memorandum in this case suggest, make its own corrections.

The underlying principle is hornbook law. As Dean Prosser

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[1]In amending section 214 of the Civil Practice Law and Rules, which details the various statutes of limitations, the Legislature, at its last regular session, included the following statements in its formal legislative findings"

> "* * * It was never the intent of the legislature, in imposing limitations, to foreclose the citizens of this state from prosecuting legitimate claims, provided such claims are diligently and expeditiously pursued. An exception to the general period of limitation rule is required when the pathological effect of an injury occurs without perceptible trauma, and the victim is blamelessly ignorant of the cause of the injury" (L. 1981, ch 266).

True, in the compromising fashion of legislative bodies (see *O'Malley* v *Macejka*, 48 NY2d 530, 533-534), these declarations were made applicable to "agent orange" cases alone. But, as with other social catalysts, what it accelerated was a return in this area to the mainstream of legal thought.

put it, "the statute of limitations does not begin to run against a negligence action until some damage has occurred" (Prosser, Law of Torts [4th ed], p 144). Or, as was acknowledged with apparent reluctance in Schwartz, "since, then, the recognized damages in negligence cases are pain and suffering, lost earnings and, we suppose, damage to the structure of the body, it is questionable whether any cause of action exists before these things actually happen" (*Schwartz, supra*, at p 217).

In this Court, contrary rulings have troubled its Judges, and, ultimately, have been repudiated by the court as a whole. So, in *Schwartz* itself, a strong dissent by Chief Judge Desmond and Judge (later Chief) Judge Fuld left no room for misunderstanding when it warned that "it would be unreasonable and perhaps unconstitutional to hold that time to sue expired before it was possible for plaintiff to learn of the wrong" (*Schwartz, supra*, at p 219). And, the clarion clear comment that "it is unthinkable that a person should be time-barred from prosecuting a cause of action before he ever had one", first made by Judge (later Chief Judge) Breitel in dissent in *Mendel v Pittsburgh Plate Glass Co.* (25 NY2d 340, 346), was later to be adopted by the whole court in *Victorson v Bock Laundry* (37 NY2d 395, 401).

Guided by these beacons, I now turn to the opposing positions on which summary judgment turned. The defendants' needs no elaboration; it is simply that the actions arose when each of the plaintiffs breathed the asbestos-laden air, that is, at the time of exposure. If this contention is credited, of course, the wrongful conduct and ensuing damages for all practical purposes would have been simultaneous. But the plaintiffs do not agree; they insist that the scientific facts are at odds with this unified concept. Pointing to medical authority, they contend that, while the unwanted invasions of their lungs by environmental air which had been contaminated by asbestos dust are the wrongful acts to which they were subjected, the damages they sustained

were in the form of diseases which did not come about until much later. From this exposition, the diseases, asbestosis and mesothalioma, the latter a cancer of the mesothelial cells which surround the organs of the chest cavity, are said to be consequential, as distinguished from immediate, in their temporal character (see also *Urie v Thompson*, 337 US 163, 170 ["consequences of the exposure are the product of a period of time rather than a point of time"]).

The plaintiffs go on to assert that the properties of particles of asbestos are such that their inhalation will not necessarily result in the contraction of the disease; that, unlike chemical compounds, the particles do not break down into reactive elements when lodged in the body; that those who are exposed may never sustain any injury at all; that, even if a cancerous tumor later forms, it will not have begun to do so at the time of exposure; that, before such an event will occur, the asbestos may lay dormant for years; and that the future time when it may develop is unpredictable.

In this apposition, the statute of limitations question is not one presenting a choice, as the majority would have it, between the times of inhalations and the times of discovery of the subsequent disease. Were that so, absent a discovery rule, the defendants' motions would indeed have had to have been granted. But, since the issue of fact fleshed out by the motions instead left it a case of dates of inhalation versus dates when the damaging disease came into existence, the question was one for triers of fact.

It follows that the orders of the Appellate Division must be reversed and the cases remitted for trial on the merits.

* * * * * *

Order affirmed, with costs, in a memorandum. All concur, Meyer, J., on constraint of *Thornton* v. *Roosevelt Hosp.* (47 NY2d 780); except Fuchsberg, J., who dissents and votes to reverse in an opinion.

Decided October 29, 1981

DECISION OF APPELLATE DIVISION OF STATE OF NEW YORK

DECISION OF APPELLATE DIVISION, FOURTH DEPARTMENT.

493. (Erie Co.) — Mtr. of Jeanne Steinhardt, as Executrix for James McKee, Jr., Appellant-Respondent, v. Johns Manville Corporation, et al., Respondents-Appellants, and Unarco Industries, Inc., Respondent. — Order modified and as modified affirmed without costs and complaint dismissed, in accordance with the following Memorandum: Decedent James McKee had been employed continuously working with a variety of asbestos products from 1944 until 1970. In 1970 he developed respiratory ailments and stopped working because of his deteriorating physical condition. In 1973 his condition was conclusively diagnosed as asbestosis/pulmonary fibrosis with a moderate degree of obstructive pulmonary emphysema, all of which relate to the asbestos which plaintiff had allegedly ingested over his years of employment. This action was commenced in 1975 and plaintiff served a complaint in which alleged causes of action for negligence, strict products liability and breach of warranty of fitness and merchantability. (In August, 1979 McKee died of mesothelioma — an asbestos related cancer and a substitute plaintiff continues the action.)

Plaintiff concedes that the cause of action for breach of warranty was properly dismissed as time barred, but argues that the negligence and strict products liability causes of action were timely, having been commenced within three years of the discovery of his condition.

Plaintiff's argument is without merit. "The injury occurs when there is a wrongful invasion of personal or property rights and then the cause of action accrues. . . . [T]he statutory period of limitations begins to run from the time when liability for loss has arisen even though the injured party may be ignorant of the existence of the wrong or injury." (Schmidt v. Merchants

Dispatch Trans. Co., 270 NY 287, 300; see, also, Reis v. Pfizer, Inc., 48 NY2d 664; Thornton v. Roosevelt Hosp., 47 NY2d 780; Schwartz v. Heyden Newport Chemical Corp., 12 NY2d 212.) Here, the injury to plaintiff occurred when he inhaled the allegedly harmful substances, which was no later than 1970. Thus, the negligence cause of action was properly dismissed. Similarly, the cause of action for strict products liability sounds in tort and the period of limitations is the same as the period for negligence (Victorson v. Bock Laundry Mach. Co., 37 NY2d 395). Accordingly, the cause of action for strict products liability should also be dismissed. All concur, Callahan, J. not participating. (Appeals from Order of Erie Supreme Court, Kuszynski, J. — Dismiss Causes of Action.) Present: Cardamone, J.P., Simons, Callahan, Doerr, Moule, JJ.

DECISION OF SPECIAL TERM, SUPREME COURT, COUNTY OF ERIE, STATE OF NEW YORK

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

JAMES McKEE, JR.,

Plaintiff,

—*vs*—

JOHNS MANVILLE CORPORATION; EAGLE-PICHER INDUSTRIES, INC.; PHILIP CAREY INDUSTRIES, INC.; OWENS-CORNING FIBERGLASS CORPORATION; ARMSTRONG CORK COMPANY; FIBREBOARD PAPER PRODUCTS CORPORATION; COMBUSTION ENGINEERING, INC.; PITTSBURGH CORNING CORPORATION; UNARCO INDUSTRIES, INC.; ARMSTRONG CONTRACTING AND SUPPLY CORPORATION; STANDARD ASBESTOS MANUFACTURING & INSULATING CO.; KEENE INSULATION COMPANY; ROCKWELL MANUFACTURING CO., and RUBEROID COMPANY, DIVISION OF GAF CORPORATION,

Defendants.

LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER & JAMES (James W. Kirkpatrick, Esq., of Counsel) for Plaintiff,

HAGERTY & HAGERTY (James J. Hagerty, Esq. of Counsel) for Pittsburgh Corning Corp.

BROWN, MALONEY, GALLUP, ROACH & BUSTEED, P.C. (Daniel T. Roach, Esq. of Counsel) for Johns-Manville Corp.

SAPERSTON, DAY & RADLER, (Thomas F. Segalla, Esq., of Counsel) for Fibreboard Paper Products,

Decision of Special Term, Supreme Court, County of Erie, State of New York

ROBERT M. KIEBALA, ESQ., for Eagle-Picher Industries,

BROWN, KELLY, TURNER, HASSETT & LEACH (Gordon D. Tresch, Esq., of Counsel) for Owens-Corning Fiberglass,

HURWITZ & FINE, P.C. (John J. Quackenbush, Jr., Esq., of Counsel) for Armstrong Cork Company,

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR (John J. Cooney, Esq., of Counsel) for Armstrong Contracting and Supply Co.,

PHELPS, GRAY, MANSOUR & HEWITT (Benjamin Hewitt, Esq., of Counsel) for Combustion Engineering Inc.,

WEAVER, MAGHRAN & McCARTHY, (Irving C. Maghran, Esq., of Counsel) for Unarco Industries,

LANSDOWNE & GREENE (James W. Greene, Esq., of Counsel) for Standard Asbestos Manufacturing,

SMITH, MURPHY & SCHOEPPERLE (Frank G. Godson, Esq., of Counsel) for Kenne Insulation,

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER (Paul F. Jones, Esq., of Counsel) for Ruberoid Company.

NO APPEARANCE FOR PHILIP CAREY INDUSTRIES.

MEMORANDUM

KUSZYNSKI, J.

Plaintiff, JAMES McKEE, JR., who maintains he has developed the disease asbestosis as the result of his thirty years as an insulation employee, brings this action against 14

defendants who allegedly manufactured and marketed the asbestos products.

Defendants herein named, pursuant to CPLR 3211 (a) (5) move to dismiss the complaint and the cross-complaints of the co-defendants upon the ground the actions were not commenced within the time provided for in the Statute of Limitations, and also pursuant to CPLR 3212 for summary judgment.

Plaintiff's complaint contains three causes of action collectively against the defendants in negligence, strict products liability in tort and for breach of warranty. It sets forth that "by reason of exposure to and inhalation of asbestos particles and dust as well as other contaminants found in defendants' products and materials", the plaintiff contracted asbestosis and pulmonary fibrosis. (Par. 20, Complaint)

To date the defendants have had a deposition before trial of the plaintiff and of his treating physician, Dr. Howard Paul Longstreth, while plaintiff as yet, has not had any discovery proceedings. Therefore, defendant's Fibreboard Paper Products Corporation motion to dismiss because of plaintiff's failure during his oral deposition to specifically identify Fibreboard as a manufacturer of any asbestos containing product he may have handled, and defendant's Armstrong Cork Company similar motion in relation to its product called "Armaspray" and "L.T. Cork Covering" are premature. They are denied without prejudice to being renewed when plaintiff's discovery proceedings are concluded.

Most critical, however, to plaintiff's lawsuit is the issue of the Statute of Limitations.

Mr. McKee alleges in his complaint that he has been disabled since October 30, 1972 and his condition was first diagnosed as "asbestosis-pulmonary fibrosis", some time in the 2-week

period between March 29, 1973 and April 13, 1973. Defendants maintain that according to his medical records, the plaintiff may have suffered from this disease since 1968.

Plaintiff states he is unemployed since 1970, except for a period from August, 1972 to October 29, 1972, during which he worked for Frontier Insulation Co. (Bill of Particulars, ¶¶ 2 and 3) At the deposition before trial and at the Workmen's Compensation Board hearing concerning his compensation claim, Mr. McKee stated he did not know whether any asbestos was involved in the course of this employment. The superintendent at Frontier Insulation, Robert Wopperer, testified at the Compensation hearing, however, that the materials plaintiff worked with did not contain asbestos. Defendants set forth in the moving papers that "Thereafter when Frontier Insulation sought to be discharged, Mr. McKee's counsel conceded that plaintiff had not used any asbestos products and that the Referee subsequently discharged Frontier Insulation on the basis that plaintiff has not been exposed to asbestos during that employment."

While determinations of administrative boards are not necessarily binding on the courts of law, the doctrine of collateral estoppel prevents plaintiff from re-litigating the issue of whether he was exposed to asbestos during 1972 when he was employed at Frontier Insulation. See *Ogino v. Black*, 304 NY 872; *Doca v. Federal Stevedoring Co.*, 280 App Div 940, 116 NYS2d 25, affd 205 NY 648; *Schwartz v. Public Administrator*, 24 NY2d 65, 298 NYS2d 955. Especially so, since Mr. McKee in his answering papers had failed to preserve this question in any way as a triable issue.

Thus, for the Statute of Limitations purposes, Mr. McKee's last exposure to asbestos was during his employment in 1970 and argueably the diagnosis of his condition was not made until

March or April, 1973. The summonses were served upon the defendants in August, 1975.

Proceeding now to consider the causes of action alleged against the defendants:

> "A cause of action for strict products liability in 'independent' (*Micallef v. Miehle Co., Division of Miehle-Goss Dexter*, 39 NY2d 376, 382) of a cause of breach of warranty (or negligence) and the fact that one is barred does not preclude the other."

Murphy v. General Motors Corp., 55 AD2d 486, 391 NYS2d 24 (3rd Dept. 1977)

It is imperative that this Court consider the Statute of Limitations separately as to each cause of action in determining whether plaintiff's lawsuit is barred.

The first cause of action is framed in the traditional negligence setting and is controlled by the requisites as set forth in *Schmidt v. Merchants Dispatch Transportation Co., 270 NY 287 (1936). Here, for plaintiff to succeed, it is necessary for him to allege and show both diagnosis and exposure within the three (3) year period preceding the action. A direct challenge to Schmidt, supra* was rejected in *Schwartz v. Heyden Newport Chemical Corp.*, 12 NY2d 212, 237 NYS2d 714, cert den 374 US 808, 83 S.Ct.1697, (1963) when the Court stated:

> "The wrong is done, the right violated and the cause of action complete when the invasion takes place independently of any actual pecuniary damage."

Therefore, plaintiff McKee's action in negligence is barred by the Statute of Limitation, CPLR 214, because he was not *exposed* to asbestos while employed, during the period of three (3) years preceding the service of the summons upon the defendants.

Decision of Special Term, Supreme Court, County of Erie, State of New York

Mr. McKee's second cause of action is anchored on the theory of strict products liability established in this State by *Codling v. Paglia*, 32 NY2d 330, 345 NYS2d 461 (1973). Strict products liability is a separate and distinct cause of action from traditional negligence and as such, is not controlled by the Statute of Limitations established in *Schmidt, supra*. The period of limitation as to a claim grounded on this approach to liability was determined to "begin to run at the time of injury" and continues for a period of three (3) years. *Victorson v. Bock Laundry Machine Co.*, 37 NY2d 395, 373 NYS2d 39 (1975).

The enigmatic question then surfaces as to when did the "injury" occur. A review of the cases in the area reveals this question to be unanswered by the Courts of this State in its application to "occupational diseases" actions brought under the theory of strict products liability. Recent decisions in other jurisdictions have generally held that the issue of the Statute of Limitations in such cases is a proper factual matter for the jury or the trier of the facts to decide, and that the date of diagnosis should measure the date the Statute of Limitations begins to run, unless the defendants can show that the plaintiff should, in the exercise of reasonable diligence, have earlier discovered the nature of the disease. *Ricciuti v. Voltarc Tubes, Inc.* 277 F2d 908 (2nd Cir., 1960). See also *Karjala v. Johns-Manville Products Corp.*, 523 F2d 155 (1975); *Borel v. Fibreboard Paper Products, Corp.*, 493 F2d 1076 (1973).

In New York, it has been previously held that the question of determining the time of injury, for purposes of fixing the time the Statute of Limitations began to run, is a proper triable issue. *Orloff Towers Inc. v. Vermilya-Brown Co.*, 50 AD2d 740, 377 NYS2d 8 (1st Dept., 1975).

> "[T]here is rarely a magic moment, when one exposed to asbestos can be said to have contracted asbestosis; the

> exposure is more in the nature of a continuing tort. It is when the disease manifests itself in a way which supplies some evidence of causal relationship to the manufactured product that the public interest in limiting the time for asserting a claim attached and the statute of limitations will begin to run. The time at which Karjala's impairment manifested itself was, of course, for the jury to determine." *Karjala, supra* at 160, 161.

Furthermore, recent analagous New York State decisions on the application of "date of discovery rule" to medical malpractice actions are in accord with the rule that a Statute of Limitations begins to run from the time of discovery of the disease in occupational disease cases. See *Flanagan v. Mt. Eden General Hospital*, 24 NY2d 427, 301 NYS2d 23 (1969); *Smalls v. New York City Health & Hospital Corp.*, 55 AD2d 537, 389 NYS2d 372, (1st Dept., 1976); *Merced v. New York City Health and Hospital Corp.*, 56 AD2d 553, 391 NYS2d 863 (1st Dept., 1977).

It appears the incubation period for asbestosis ranges up to as long as 15 to 25 years. Therefore, measuring the injury from the date of a last exposure would effectively deny relief to many workers who were employed in the industry for a lesser period.

> "We think it unreasonable to hold that the statute of limitations begins to run against an injured person at a time when he does not in fact know and could not with the exercise of reasonable diligence know, what his injury is. To hold would nullify any right to recover for many serious but slowly and insidiously developing diseases."

Ricciuti v. Voltarc Tubes, Inc., supra.

See 63 Harv. L. Rev. 1177.

The deposition of plaintiff's physician, Dr. Howard Paul Longstreth, the negative biopsy performed upon plaintiff in

March, 1968 and the absence of any contradictory medical proof is sufficient to preserve the issue of the date of McKee's injury by asbestosis for trial. The time of the diagnosis marks the date the statute of limitations began to run, unless the defendants can show that the plaintiff should have, in the exercise of reasonable diligence discovered earlier the nature of the disease.

Plaintiff's third cause of action is grounded upon defendants' alleged breach of warranty of fitness and merchantability stemming from the contract of sale of the asbestos by the manufacturers to plaintiff's employers. It is controlled by a four (4) year Statute of Limitations commencing at the time of sale. *Uniform Commercial Code Section 2-275, See 62-1/2 McKinney's Section 2-275, NY Annotation.* This action is barred because defendants clearly could have only sold the asbestos products allegedly involved in plaintiff's injury to his employers prior to the termination of his employment in 1970, more than four (4) years before the service of the summonses.

This Court finds that plaintiff McKee's theories of recovery based upon negligence and breach of warranty are barred by the applicable Statutes of Limitations; plaintiff's theory of strict products liability, however, is viable because the question of when the injury occurred is a triable issue.

Leave is granted to defendants to preserve their objections concerning the Statute of Limitations as an affirmative defense. Their answers are due within twenty (20) days of the entry of the order herein.

Submit order accordingly.

DATED: Buffalo, New York
April 27, 1978.

/s/ JOSEPH P. KUSZYNSKI
Justice of the Supreme Court

JUDGMENT OF NEW YORK COURT OF APPEALS

Remittitur

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

4 No. 434

In the Matter of Jeanne Steinhardt, as Executrix for James McKee, Jr.,

Appellant,

v.

Johns-Manville Corporation, et al.,

Respondents.

The appellant in the above entitled appeal appeared by Lipsitz, Green, Fahringer, Roll, Schuller & James, Esqs.

the respondent(s) appeared by Saperston, Day & Radler, Esqs.; Phillips, Lytle, Hitchcock, Blaine & Huber, Esqs.; Brown, Maloney, Gallup, Roach & Busteed, Esqs.; Hodgson, Russ, Andrews, Woods & Goodyear, Esqs.; Phelps, Gray, Mansour & Hewitt, Esqs.; Hurwitz & Fine, Esqs.; Brown, Kelly, Turner, Hassett & Leach, Esqs.; Hagerty & Hagerty, Esqs.; Robert M. Kiebala, Esq.; Smith, Murphy & Schoepperle, Esqs.; Dale, Hawthorne, Markarian, Ginsburg & Siegel, Esqs.; Maghran, McCarthy & Flynn, Esqs.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs, in a memorandum. All concur, Meyer, J., on constraint of *Thornton* v. *Roosevelt Hosp.* (47 N Y 2d 780); except Fuchsberg, J., who dissents and votes to reverse in an opinion.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to

the Supreme Court, Erie County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ DONALD M. SHERAW
Deputy Clerk of the Court

Court of Appeals, Clerk's Office, Albany, October 29, 1981

STATE OF NEW YORK, COUNTY OF ERIE, ss:

I, GENEVIEVE M. STAROSCIAK, Clerk of said County, and also Clerk of Supreme and County Courts of said County, do hereby certify that I have compared the annexed copy with the original Order filed in my office, and that the same is a correct transcript therefrom and of the whole of said original.

WITNESS my hand and seal of said County and Courts on December 9, 1981.

/s/ GENEVIEVE M. STAROSCIAK
County Clerk

(Seal)

AMENDMENT TO REMITTITUR BY NEW YORK COURT OF APPEALS

STATE OF NEW YORK, COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-second day of December A.D. 1981

PRESENT, Hon. Lawrence H. Cooke, *Chief Judge, presiding.*

4 Mo. No. 1221 (A)

In the Matter of Jeanne Steinhardt, as Executrix of James McKee, Jr.,

Appellant,

vs.

Johns-Manville Corporation, et al.,

Respondents.

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the plaintiff Steinhardt, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, return of the remittitur is requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the holding that the plaintiff's causes of action accrued and the statutes of limitations commenced when the employment-related exposure to asbestos particles occurred deprived plaintiff of due process of law.

AND the Supreme Court, County of Erie, hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

/s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

NOTICE OF APPEAL TO UNITED STATES SUPREME COURT

STATE OF NEW YORK COURT OF APPEALS

In the Matter of JEANNE STEINHARDT, as Executrix of JAMES McKEE, JR.,

Appellant

-vs-

JOHNS-MANVILLE CORPORATION, EAGLE PICHER INDUSTRIES, INC., PHILLIP CAREY INDUSTRIES, INC., OWENS-CORNING FIBERGLASS CORPORATION, ARMSTRONG CORK COMPANY, FIBREBOARD PAPER PRODUCTS CORPORATION, COMBUSTION ENGINEERING, INC., PITTSBURGH CORNING CORPORATION, STANDARD ASBESTOS MANUFACTURING AND INSULATING CO., KEENE INSULATION COMPANY, ROCKWELL MANUFACTURING CO., RUBEROID COMPANY, Division of GAF CORPORATION, and UNARCO INDUSTRIES, INC.,

Appellees

U. S. DOCKET NO.

ERIE COUNTY INDEX NO. E-20645

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

SIRS:

NOTICE IS HEREBY GIVEN that JEANNE STEINHARDT, as Executrix of JAMES McKEE, JR., the appellant above named, hereby appeals to the Supreme Court of the

Notice of Appeal to United States Supreme Court

United States from the final judgment of the Court of Appeals for the State of New York entered in the office of the clerk of that court on October 29, 1981, affirming the dismissal of the complaint, and that order of the Court of Appeals for the State of New York having subsequently been entered in the office of the clerk of the Supreme Court, Erie County, on November 10, 1981, that court now being the office possessed of the record.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

DATED: December 10, 1981

LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
FRANK S. KEDZIELAWA, ESQ.,
CARL A. GREEN, ESQ.,
Of Counsel
Counsel for Appellant
One Niagara Square,
Buffalo, New York 14202
(716) 849-1333

ORDER EXTENDING APPELLANT'S TIME TO DOCKET APPEAL

SUPREME COURT OF THE UNITED STATES

No. A-569

JEANNE STEINHARDT, AS EXECUTRIX OF JAMES McKEE, JR.,

Appellant

v.

JOHNS-MANVILLE CORPORATION

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the time for docketing an appeal in the above-entitled case be, and the same is hereby, extended to and including February 26, 1982.

/s/ THURGOOD MARSHALL
Associate Justice of the Supreme
Court of the United States

Dated this 28th
day of December, 1981.